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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ROBERTO CRESPO MAQUEDA,
12 Detainee No. A-201-221-552,

13 Plaintiff,

14 vs.
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16 UNITED STATES DEPARTMENT OF
17 HOMELAND SECURITY,

18 Defendant.
19

Civil No. 14cv1186 LAB (JLB)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
(ECF Doc. No. 2)**

AND

**(2) DISMISSING CIVIL ACTION
FOR FAILING TO STATE A
CLAIM PURSUANT
TO 28 U.S.C. § 1915(e)(2)**

20 Roberto Crespo Maqueda (“Plaintiff”), currently detained at the San Diego
21 Correctional Facility located in San Diego, California, and proceeding pro se, has filed
22 a civil complaint pursuant to *Bivens v. Six Unknown Names Agents of the Federal*
23 *Bureau of Narcotics*, 403 U.S. 388 (1971) and the Federal Tort Claims Act (“FTCA”),
24 28 U.S.C. § 1346(b)(1).

25 Plaintiff has not prepaid the filing fee required to commence a civil action; instead,
26 he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C.
27 § 1915(a) (ECF Doc. No. 3).

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I.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus must pay a filing fee of \$400.¹ See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, "[u]nlike other indigent litigants, prisoners proceeding IFP must pay the full amount of filing fees in civil actions and appeals pursuant to the PLRA [Prison Litigation Reform Act]." *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002). As defined by the PLRA, a "prisoner" is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 28 U.S.C. § 1915(h). Under this definition, "an alien detained by the INS pending deportation is not a 'prisoner' within the meaning of the PLRA," because deportation proceedings are civil, rather than criminal in nature, and an alien detained pending deportation has not necessarily been "accused of, convicted of, sentenced or adjudicated delinquent for, a violation of criminal law." *Agyeman*, 296 F.3d at 886. Thus, because Plaintiff claims he is an immigration detainee, and not a "prisoner" as defined by 28 U.S.C. § 1915(h), the filing fee provisions of 28 U.S.C. § 1915(b) do not apply to him. See Compl. at 2.

Accordingly, the Court has reviewed Plaintiff's affidavit of assets and finds it is sufficient to show that he is unable to pay the fees or post securities required to maintain this action. Therefore, Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 3) is GRANTED .

¹ In addition to the \$350 statutory fee, all parties filing civil actions *on or after May 1, 2013*, must pay an additional administrative fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 II.

2 SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)

3 Any complaint filed by a person proceeding IFP is subject to sua sponte dismissal
 4 by the Court to the extent it contains claims which are “frivolous, malicious, fail to state
 5 a claim upon which relief may be granted, or seek monetary relief from a defendant
 6 immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845,
 7 845 (9th Cir. 2001) (per curiam) (holding that “the provisions of 28 U.S.C.
 8 § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
 9 Cir. 2000) (en banc) (“[S]ection 1915(e) not only permits, but requires a district court to
 10 dismiss an in forma pauperis complaint that fails to state a claim.”)

11 First, Plaintiff seeks to bring a claim pursuant to the FTCA, which waives
 12 sovereign immunity for certain torts committed by federal employees. *FDIC v. Meyer*,
 13 510 U.S. 471, 475 (1994). The FTCA provides that district courts have exclusive
 14 jurisdiction of civil actions against the United States for money damages “for injury or
 15 loss of property, or personal injury or death caused by the negligent or wrongful act or
 16 omission of any employee” of the federal government while acting within the scope of
 17 his office or employment. 28 U.S.C. § 1346(b); *Meyer*, 510 U.S. at 475. However,
 18 Plaintiff’s Complaint fails to allege, among other things necessary to state a valid claim
 19 under the FTCA, that he exhausted his administrative remedies under the FTC prior to
 20 filing suit. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) (“The FTCA bars
 21 claimants from bringing suit in federal court until they have exhausted their
 22 administrative remedies.”); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980) (“The
 23 timely filing of an administrative claim is a jurisdictional prerequisite to the bringing of
 24 a suit under the FTCA, and, as such, should be affirmatively alleged in the complaint.”).
 25 Based on this fundamental jurisdictional defect, Plaintiff’s FTCA claims must be
 26 dismissed for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2). *See Lopez*, 203
 27 F.3d at 1127.

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Second, to the extent Plaintiff seeks to hold the Department of Homeland Security liable for alleged civil rights violations pursuant to *Bivens*, 403 U.S. at 388, his claims also fail. *Bivens* established that “compensable injury to a constitutionally protected interest [by federal officials alleged to have acted under color of federal law] could be vindicated by a suit for damages invoking the general federal question jurisdiction of the federal courts [pursuant to 28 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S. 478, 486 (1978). *Bivens* provides that “federal courts have the inherent authority to award damages against federal officials to compensate plaintiffs for violations of their constitutional rights.” *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000). However, a *Bivens* action may only be brought against the responsible federal official in his or her individual capacity. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988).

Bivens does not authorize a suit against the government or its agencies for monetary relief. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988); *Daly- Murphy*, 837 F.2d at 355. Accordingly, to the extent that Plaintiff is seeking to sue the Department of Homeland Security for alleged constitutional violations, he may not do so in this *Bivens* action.

Finally, in his Complaint, Plaintiff alleges that Defendants have “acted specifically with the intent to deprive plaintiff of his constitutional rights to be free from unlawfully and unreasonable deportation. (Compl. at 3.) However, *Bivens* relief is not available when a plaintiff is attempting to sue “federal agents for wrongful detention pending deportation.” *Mirmehdi v. United States*, 689 F.3d 975, 983 (9th Cir. 2012).

III.

CONCLUSION AND ORDER

Good cause appearing therefor, IT IS HEREBY ORDERED that:

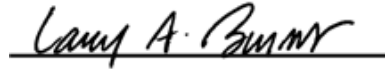
1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 3) is GRANTED.

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1 IT IS FURTHER ORDERED that:

2 2. Plaintiff's Complaint is DISMISSED without prejudice for failing to state a claim
3 pursuant to 28 U.S.C. § 1915(e)(2)(b). However, Plaintiff is GRANTED forty five (45) days
4 leave from the date this Order is filed in which to file a First Amended Complaint which cures
5 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
6 itself without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not
7 named and any claim not re-alleged in the Amended Complaint will be considered waived. *See*
8 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

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10 DATED: June 27, 2014

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12 **HONORABLE LARRY ALAN BURNS**
13 United States District Judge
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